RECORD
AND
BRIEFS

No. 09-1316

Supreme Court, U.S.
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In The
Supreme Court of the United States

TRACY BROWN,
Petitioner,

v.

JEFFREY MARK OLSON,
Respondent.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
for the Seventh Circuit

PETITIONER'S REPLY BRIEF

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ARGUMENT

Contrary to Respondent's assertion, the scope of the inherently transitory exception to pre-certification mootness in the class action context is unclear, and the Circuits have been far from uniform in their application of that exception.

According to the Respondent, the proper inquiry for application of the exception is for the court to ascertain: 1) whether the duration of a named plaintiff's claim is uncertain at the outset; 2) whether any individual's claim is likely to be rendered moot prior to class certification; and 3) whether there is a constant class of persons subject to the alleged deprivations. *See* Brief in Response at 6, 9. If such clarity and uniformity exist, one would expect the case law to demonstrate attention to these questions and, where answered in the affirmative, the cases proceeding despite the plaintiff's lack of an ongoing personal stake in the subject matter.

However, the approaches are not uniform. The Third Circuit recognizes this explicitly. The Third Circuit looks to whether the named Plaintiff has a personal stake at the time the motion for class certification is filed. If the class is ultimately certified, the certification will be deemed to "relate back" to the date the motion for certification was filed, regardless of whether the named plaintiff lost his personal stake in the interim. *Lusardi v. Xerox Corporation*, 975 F.2d 964, 977 fn 19, 982 fn 32 (3d Cir. 1992). The Third Circuit

recognized that "other courts do not share this view."[1] *Id. See also Holmes v. Pension Plan of Bethlehem Steel Corporation*, 213 F. 3d 124, 135 (3d Cir. 2000) ("So long as a class representative has a live claim at the time he moves for class certification, neither a pending motion nor a certified class action need be dismissed if his individual claim subsequently becomes moot.")

The clarity and uniformity of the "inherently transitory" exception as described by Respondent is not apparent in the First Circuit's decision of *Cruz v. Farquharson*, 252 F.3d 530 (1st Cir. 2001). That case involved a challenge to "the manner in which the Immigration and Naturalization Service (INS) processes (or fails to process) petitions by citizens requesting permanent residence in the United States for their alien spouses." *Id.* at 531. The petitions of the named plaintiffs had all been filed prior to January 1, 1998 and yet, some twenty months later when the plaintiffs filed suit on August 18, 1999, no action had been taken by the INS.[2] However, by October 29, 1999,

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[1] Indeed, nothing in the Supreme Court cases or Trial Rule 23 attaches significance to the filing of the motion for class certification. Actual certification is the legally significant moment. *Sosna v. Iowa*, 419 U.S. 393, 399 fn. 8 (1975). ("When the District Court certified the propriety of the class action, the class of unnamed persons described in the certification acquired a legal status separate from the interest asserted by appellant. . . . The certification of a suit as a class action has important consequences for the unnamed members of the class.") If relation back is appropriate, the relation back is to the date of the complaint, not the date of the class certification motion. *Id.* at 402 fn. 11.

[2] Respondents characterize the *Farquharson* claims as being live for twenty-two months, apparently presuming a cause of action arising at the time their petition was filed rather than giving the INS some amount of

all of the named plaintiffs' petitions had been resolved. The elements of inquiry identified by the Respondents would have to be answered in the affirmative by the First Circuit. There was undoubtedly a constant class with "literally thousands of similarly situated individuals who have IRV petitions and/or residency applications pending in the INS's Boston office." *Id.* at 536, fn. 6. None of the named plaintiffs could know the duration of their claim at the outset; the duration was substantially at the discretion of the INS and, in any event, not of a certain duration or in the control of the named plaintiffs. And, the mooting of the cases of the four named plaintiffs within a three month period after the lawsuit was filed demonstrated that any given individual was not certain to have a claim long enough for a district court to certify the class prior to the claim becoming moot. And yet, despite the fact that the elements identified by the Respondent were present, the First Circuit concluded the inherently transitory exception was not available and dismissed the matter as moot.

The reason for the First Circuit's conclusion, even in the face of the elements highlighted by Respondent, is that the scope of the "inherently transitory" exception is not so clear nor its application so uniform as the Respondent suggests. The First Circuit found significant that the claims

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time to process the petitions before the delay became actionable. Brief of Respondent at 12. By contrast, Respondent urges that Mr. Olson's claim for prospective injunctive relief should not begin on the date he became subject to the policies of the Tippecanoe County Jail, but rather, allowances should be made for Mr. Olson to actually suffer harm from the objectionable practices before beginning the grievance process and, once exhausted, recruit legal counsel and engage in factual and legal investigation. Brief of Respondent at 8, fn.3.

themselves were not inherently of a type likely to escape review and dismissed on that basis. *Id.* at 535. The plaintiffs' individual experiences, even coupled with the presence of thousands of similarly situated individuals and even though no given plaintiff could know the duration of his or her claim in advance, were not enough to demonstrate that the claims generally were inherently transitory such that the personal stake requirement could be abandoned. *Id.*

Petitioner is not the first to observe this confusion. One scholar described the Supreme Court's approach to standing and mootness in the class action context as fluctuating between formalistic and functional approaches, resulting in lower court decisions that have become "a confused and conflicting morass." Jean Wegman Burns, *Standing and Mootness in Class Actions: A Search for Consistency*, 22 U.C. DAVIS L. Rev. 1239, (1988 - 1989) (particularly reviewing pre-certification mootness issues at 1263-1269.) More recently, lower court decisions have been characterized as "fractured" over the boundaries of mootness in the class action context. Daniel A. Zariski, et. al., *Mootness in the Class Action Context: Court Created Exceptions to the 'Case or Controversy' Requirement of Article III*, 26 The Rev. of Litigation 77, 85 (Winter 2007).

Zariski suggests that the Supreme Court has yet to speak definitively on the impact of the mooting of a named plaintiff's claim before class certification, leading to significant disagreement among and within circuit courts and to four broad approaches to the question: 1) a strict approach mandating dismissal if a named plaintiff's claims become moot prior to certification; 2) a narrow, inflexible exception allowing an action to proceed to class certification so long as

a certification motion has been filed prior to mooting of a named plaintiff's action; 3) an expansive approach where a case is allowed to proceed even where it becomes moot prior to filing of a class certification motion; and 4) the approach of the 9th Circuit which Zariski describes as "ad hoc." *Id.* at 85.

Much of the confusion with respect to the "inherently transitory" exception stems from the Supreme Court's ambiguous use of the phrase "any given individual," *Gerstein v. Pugh*, 420 U.S. 103, 110 fn. 11 (1975) ("It is by no means certain that any given individual, named as plaintiff, would be in pretrial custody long enough for a district judge to certify the class.")

In its more inclusive meaning, with emphasis on "given," the phrase "any *given* individual" indicates that, unless a particular person could be certain in advance that his personal claim would endure long enough for the district court to certify the class, the claim would not be mooted. This is the meaning that the Seventh Circuit seems to have taken. *Olson v. Brown*, 594 F.3d 577, 582 (7th Cir. 2010) (Petitioner's App. 9) ("the essence of the exception is uncertainty about whether a claim will remain alive for any given plaintiff long enough for a district court to certify the class. . . the crux of the 'inherently transitory' exception is the uncertainty about the length of time a claim will remain alive.") Given that the parties stipulated that a representative jail population consists of at least forty-one (41) inmates subject to the jail's policies for in excess of a year, the presence at the jail of inmates whose claims would endure through class certification is certain. It is their particular identity in advance that may be uncertain. Application of the inherently transitory exception makes sense in Olson's case

if mootness applies only where there is certainty, in advance, about an individual inmate's claim.

More restrictively, with emphasis on "any," the phrase "*any* given individual" indicates that, before the 'inherently transitory' exception applies, there must be uncertainty as to whether the type of claim would persist long enough for anybody at all to allow for a ruling on class certification. This is the meaning that the First Circuit seems to have taken. *Cruz v. Farquharson*, 252 F.3d 530, 535 (1st Cir. 2001) ("[T]he plaintiffs have not shown at this juncture that the generic types of claims that they seek to pursue are likely to evade review . . . . the plaintiffs' experience, in and of itself, constitutes too frail a foundation to support the conclusion that [the claims are inherently transitory.]") As the First Circuit put it, "one swallow does not a summer make." *Id.*

The First Circuit is not the only circuit to dismiss as moot a case where the duration of the plaintiff's claim was uncertain at the inception of the case, where there was uncertainty as to which particular claimant could maintain the claim through class certification, and where there was a class of similarly situated individuals.

In the Fifth Circuit case of *Rocky v. King*, an inmate complained of the conditions of field labor at the prison. At the inception of his case, he could not be certain how long he would be assigned to field work and, indeed, due to health concerns, he was removed from the fields prior to class certification. Any of the other inmates could have found their claim mooted by health concerns, unilateral action of prison officials, or other happenstance. There would be no way to

know in advance which inmates, if any, were certain to remain assigned to field work from the date their complaint was filed until the date of class certification. The presence of these factors notwithstanding, the Fifth Circuit saw the need to vacate the district court's entry of judgment against the plaintiff, and remand it for dismissal as moot. Despite the uncertainties, the Fifth Circuit recognized the existence of other potential champions for claims of this type, and saw no indication they would all be removed from field work prior to class certification. *Rocky v. King*, 900 F.2d 864, 870-871 (5th Cir. 1990) ("Hundreds of inmates at Angola apparently work in the fields and could file a claim identical to that filed by Rocky. There is no indication that Angola officials will remove such inmates from field work before a district court rules on class certification in order to render that claim moot.")

The Eighth Circuit case of *Inmates of Lincoln Intake and Detention Center v. Boosalis*, 705 F.2d 1021 (8th Cir. 1983) was a challenge to conditions at a Nebraska county jail. As county jail inmates, they could have no greater certainty than Mr. Olson about the duration of their claim and whether any given inmate would have a live claim long enough for class certification. That notwithstanding and despite a constant class of other inmates, the Eighth Circuit reached a result opposite from the Seventh Circuit in this case. The Eighth Circuit held that the plaintiff was required to make a showing that, absent relation back, the claims would evade review. Unlike the pretrial detainees in *Gerstein* awaiting a probable cause hearing, the presence of pretrial detainees and convicted inmates meant that evasion of review could not be taken as given. *Id.* at 1024, fn 2.

Mr. Olson claims that he has made such a showing through the stipulated facts. Brief in Opposition at 11, 13. The district court certainly did not believe so, finding it significant that 30% of the jail population is incarcerated for more than half a year. (Petitioner's App. 25). The stipulated facts did not establish that claims of the type advanced by Mr. Olson would evade review if class certification were not allowed to relate back to the filing of the complaint. They established only that a representative snapshot of the jail population consisted of 529 inmates with an average incarceration of 139 days. Of these, 128 had been incarcerated for less than 30 days, 119 between 31-90 days; 130 between 91-180 days; 121 between 181-365 days; and 41 for more than a year.

Mr. Olson attempts to bolster his position that these time frames are too short to allow for class certification by citing to a 1996 class action study by Thomas Willging collecting information about class action lawsuits in four district courts. Brief in Opposition at 7, fn. 2. The study is, at best, of indifferent assistance to Mr. Olson and, more likely, undermines his position. According to Mr. Willging, the average time to rule on class certification once a motion was filed was 2.8 months in the Northern District of California, 3.8 months in the Northern District of Illinois, 4.1 months in the Eastern District of Pennsylvania, and 8.5 months in the Southern District of Florida. Thomas E. Willging, et al, "Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules," Federal Judicial Center (1996) at page 120, figure 20. These are averages which may or may not have been representative samples of the federal judiciary as a whole in 1996, and the study includes no allowance for the possibility

of an expedited ruling where a district court is advised of a pressing need. Regardless, the inmates at the Tippecanoe County Jail for over a year could easily meet such deadlines as could some portion of those incarcerated for over six months. At the time of his ruling in this matter, Judge Sharp certainly would have been familiar with the possible time frames for a class certification ruling in the Northern District of Indiana.

At the heart of the "inherently transitory" exception is a desire that a claim not forever go without review because of application of mootness principles. The claims advanced by Mr. Olson relate to conditions of confinement at the Tippecanoe County Jail; complaints that are not any more or less transitory than other claims involving conditions of confinement at county jails. District courts are frequently called upon to address these issues and are generally able to do so without mootness concerns interfering. Mr. Olson does not present a special situation requiring application of the exception. Rather, this Court should review the Seventh Circuit's decision to ensure that the exception is limited to meet the need for which it was crafted and that the limitations imposed by Article III, §2 of the United States Constitution are properly observed.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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